

Studying Judicial Activism: A Review of the Quantitative Literature

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Abstract

This article reviews the quantitative literature on judicial review and judicial activism, focusing on the conceptualization and the operationalization of the concept. Judicial activism has primarily been debated and discussed in an abstract, normative form, with no clear meaning attached to it. This has posed problems in quantitative analyses and comparative research, where clear, unambiguous concepts are necessary. This paper argues that traditional judicial scholarship that favors behavioralistic (e.g. individual level variables) accounts of the individual, constitutional judge are giving way to studies that have a larger legal and institutional connotation to it.

Introduction

This article reviews the quantitative literature on judicial review and judicial activism with a focus on the conceptualization and the operationalization of the much debated concept in question (i.e. judicial activism). The nature of these debates has long been argued on *subjective* or abstract grounds, i.e. when and how should courts invoke their judicial review powers and what are the consequences of their actions. Somewhat recently, a few public law scholars attempted to strip judicial activism of its subjective component of when and how and focus instead on a much narrower ‘objective’ definition of it, that can be used quantitatively (discussed in more detail later).

In most liberal democracies law, courts and politics intersect in various ways. Judicial review of legislative power is generally considered as the clearest example of this dynamic. The very nature of judicial review, e.g. the power of courts to annul the acts of the legislature, is considered by many to go against democratic principles and as such, is hotly debated in politics and in the academia (Bilder 2008). During times of frequent judicial strike-downs of legislative laws, courts, or the individual justices associated with the strike downs, are labelled as *judicial activists*, which generally means „deciding a case contrary to the plain meaning of the Constitution in order to promote the judge’s political preferences” (Roosevelt III 2008: 38). This definition is based on (at least) two assumptions: first, it implies that the ‘plain meaning’ of a constitution is clear and known to man, and second, that there is a direct link between a judge’s political attitudes and his or her votes on constitutional cases. While the former is hard to test empirically (text can mean different things to different people) the latter has been the focus of constitutional scholars for decades (see, for example, Cornell and Gillmann 1999; Gann-Hall and Brace 1999; Ishyama-Smithey and Ishyama 2002; Koopmans 2005; Shapiro and Stone 1994; Shapiro 1995).

While empirical evidence supports the notion that judges’ political attitudes are associated with their decision making in court, scholars do not agree on the meaning, and the definition, of judicial activism. Curiously enough, as Kmiec argues (2004), the more commonplace the term has become, the more unclear is

its meaning (p. 1443). Some scholars speak of judicial politics while others speak of legislative judiciaries or, as in this article, judicial activism (see, for example, Shapiro and Stone 1994; Koopmans, 2005). In his 2004 work on judicial activism, Kmiec offers a thorough list of all the various definitions assigned to judicial activism, a list too long to repeat here. Despite the definitional variation though, these seem to be more or less based on the same premise: that judges (or courts) are able (regardless whether they use it or not), to a various degree, to abuse their constitutional review powers in order to enhance their own, personal policy preferences (Anant and Singh 2008).

This raises a serious, methodological question: when, exactly, are courts abusing their constitutional review powers? Is every strike against legislative laws considered as activism or do courts need to strike down a number of statutes in order to be recognized as activists? If so, then how many? And to complicate things even further, the court's interpretation of the constitutional rule in question may also be a factor. Some constitutional scholars argue that activism depends on how courts interpret the *meaning* of constitutional rules. If courts interpret it liberally, they are said to be activist courts and if they stick to the original meaning of the rule, they are exhibiting restraint¹ (Ringhand 2007). Which brings us back to the issue referred to earlier, that constitutional text means different things to different people and, therefore, is hard to define, quantify and compare across countries (Koopmans 2005; Ringhand 2007).

Traditional comparative theory holds that the concepts being compared across nations need to have a similar conceptual base. In this case, normative perspectives pose a challenge to the researcher using them comparatively, but not impossible though (Hantrais 1995). In this article I argue that judicial activism can, and should be, quantified and compared statistically across nations. Some scholars have already established credible evidence that this is indeed possible (see, for example, Ishyama-Smithey and Ishiyama; Ringhand 2007). Sidestepping the debates on the several potential *meanings* of the term and focusing instead on an empirical examination on how high court justices have in fact exercised their power, simplifies the concept and provides for a clear operationalization of it. The dependent variable is simply the degree to which judges have become actively involved in deciding constitutional debates and disallowed choices from other policy makers. Or, in short, the act of striking down laws. This approach does not address the normative question of *when* or *how* judges should use their judicial review powers to invalidate legislation. Establishing the dependent variable in this way, allows academics to search for appropriate explanatory variables and build a

1 The theory of judicial restraint sits at the opposite end of the activism/restraint nexus. It means that judges should limit the exercise of their own power. Judges should hesitate to clear legislative statutes void unless the statutes are „clearly“ unconstitutional (what ever „unclear“ means) and that their unconstitutionality is inarguable (Ringhand 2007).

solid, even cross-national, theory of constitutional judicial review (or activism). This, in turn, paves the way for solid comparisons of judicial activism across countries. In addition, this approach makes it possible to estimate the *degree* of judicial review in each country relative to the rest of them (Ishiyama-Smithey and Ishiyama 2002; Ringhand 2007). In this paper, the major research frameworks on the topic are discussed, with a focus on quantitative methods and the conceptualization of the dependent variable: judicial activism and a discussion of the possible explanatory variables. A large proportion of the literature reviewed here is North-American based. The reason for this is primarily due to the fact that studies of courts and judges have flourished in United States, to a more degree than in other countries. The United States Supreme Court became ‘political’.

Conceptualizing judicial activism

The main foundation for judicial activism is an established written or a non-written constitutional rule of judicial review of legislative powers. Without this rule, courts do not have the jurisdiction to review and annul acts of the legislature (Gillman 2004, Ishiyama-Smithey and Ishiyama 2002). This does not mean that judicial review powers in itself will necessarily foster judicial activists. Indeed, scholars have established that more factors than that need to be present for courts increased activity (this is discussed later in the paper) (Fite 2007; Koopmans 2005). The reasons for this are generally considered as twofold: 1) judicial review powers are usually ill-defined in constitutional law and, thus, allow for considerable room for interpretation and 2) these powers are, therefore, hotly debated in different countries. According to constitutional scholars judicial review may be the most publicly contested aspect of American constitutionalism. This is because when courts declare legislation void, they implicitly seem to strike at the heart of the principle of separation of powers. The act in itself suggests that the elected legislature is not always the legitimate representative of the people and that democratic majoritarianism may not be the fundamental principle in democratic politics (Bilder 2008:6).

While the idea of judicial activism can be traced far back, it didn’t become a term until around the middle of the 20th century. D. Kmiec’s traces it’s first public usage back to Arthur Schlesinger Jr.’s magazine article in January 1947 (p.1445). This late usage of the concept is a bit surprising considering that judicial review has been contested in many countries since well before the twentieth century (Kmiec 1947, Gillman 2004). Schlesinger Jr.’s article got considerable attention from the public, perhaps because of the non-legal connotation of it. In itself the word *activism* implies intentional action, action often meant to bring about social or political change. It inevitable signifies that legal reasoning is coupled with a personal choice, i.e. a judge can *choose* to be active on the bench or demonstrate restraint (Kmiec 1947). In addition, judicial activism is a catchy term and Schlesinger Jr.’s usage of it caught on. It’s popularity, however, does not

mean that there is a scholarly consensus or otherwise on its meaning. Quite on the contrary. As constitutional scholars repeatedly argue, judicial activism is a multi faced and ill-defined concept (Ishiyama-Smithey and Ishiyama 2002). It stands at the gate of two worlds: the legal realm with its positive and scientific legal world view (i.e. that laws have fixed meanings) and the social domain that emphasizes the subjectivity of laws, that legal interpretation is equally or more dependent on a person's world view or social values (Koopmans 2005; Kmiec 2004). Consequently, scholarly studies and research on judicial activism is non-conclusive. Studies of judicial behaviour in general have been relatively balkanized, with some advances within particular theoretical contexts, but with little successful effort at integrating different approaches within a comprehensive theory (Gibson 1983; Koopmans 2005). Since Schlesinger Jr's article was printed in 1947, several paradigms or methods on how to study judicial activism have appeared, some more distinguished than others. Some attempt to quantify and explain judicial activism via statistical methods while others try to subtract explanatory meaning from various legal texts and judicial decisions (Koopmans 2005). While quantitative methods are quite common in the study of courts and judges they are most of the time confined to one country. This is due to the lack of a well defined, dependent variable that is common enough to be used comparatively yet narrow enough to yield consistent, reliable results (*Ibid.* p.6).

Possibly due to the early 'politization' of the United States Supreme court, judicial research has a longer history there than in Europe. Hence, the majority of the judicial decision-making literature cited here, is North American. While similar research elsewhere is picking up the pace, there is still a vast gap between the US and Europe in this matter. Regardless, this paper argues that comparative research on judicial activism is crucial for understanding the dynamic. Unclear concepts are often clarified by cross-country comparisons. By pulling together the similarities and differences in judicial activism around the world, it is possible to develop a coincident theory on the topic. The following chapters discuss the most prominent models of judicial behavior: The attitudinal model (with an introduction of the legal model), the strategic/rational model and the new institutional paradigm. While these models offer different explanations for judicial activism (and judicial decision-making in general) they are by no means mutually exclusive and collectively exhaustive. Indeed, the models are interconnected and overlap considerably in their offering of quantitative methods (Bond 2007).

The legal model meets the attitudinal model

As has been noted, the biggest challenge facing scholars studying judicial activism lies in the lack of theory or simply a broad consensus on the dimension of the term. As Tate argues (1983) methodology should always be the servant of theory, not even its coequal, much less its master (p. 51). No matter the term, however, scholars are all more or less studying the same thing: the ability of

judges to exercise judicial powers in order to sway political policy making (Ishiyama-Smithey and Ishiyama 2002). The research methods used vary from time to time and scholar to scholar, but the general trend has been a focus on judicial decision-making on high courts or courts that have constitutional review powers in order to get a clearer sense of the judicial activism/restraint nexus.

The early days of judicial research led to the rise of the first empirical methodology: the attitudinal model. The model has its origin in the legal realist movement of the 1920's that argued against the traditional view of describing judges exclusively on the basis of legal factors, especially precedents (often referred to as the 'legal model'). The legal realists rejected the static notion of judges 'finding or discovering the law' and argued instead that lawmaking is inherent in judging (Segal 2001:78). This development paralleled the behavioral sentiments within the social sciences at that time that emphasized the systematic analysis of human behavior in a strict, empirical manner. The core notion of behavioralism is that all human behavior comes in patterns that can be studied scientifically and, therefore, predicted (Ostberg, Wetstein and Ducat 2002). From that standpoint, given good quality measurements and methods, judicial behavior can be studied systematically and predicted. This gives rise to the ultimate question: what variables would serve as the best predictors? This is where the legal model and the attitudinal model part ways. By nature, the legal concepts used by legal theorists are not good at prescribing human behavior (in this case judicial activism). The text of a constitution is a good example. How is it possible to predict Supreme Court decisions over time on the basis of constitutional statutes alone when it is well known that textual interpretations do change WHILE the text itself stays granite? According to realists, the answer was clearly to be found in the judges themselves or, in other words, in their social values and attitudes (Segal 2001: 79). This idea led to the spill of the behavioral revolution (that had already gained foothold in political science) into the science of courts and law (Maveety 2001).

The starting point can be traced to C. Herman Pritchett's analysis of the voting behavior of Supreme Court justices. He wrote two articles or essays that were published in the early 40's and led the groundwork for the publishing of his well known book, *The Roosevelt Court*, in 1948. Based on positivist, behavioral theories Pritchett systematically examined dissents, concurrences, voting blocks and ideological arrangements of the Roosevelt Court's non-unanimous decisions between 1937-1947. The analysis enabled Pritchett to identify the justices along a left-right, liberal-conservative scale with regard to the constitutional issue in question. The basic logic of the model is this: since justices are exposed to identical set of facts and receive comparable training in law, when they come to different conclusions, their political values and preferences are in the forefront (Bond 2007: 904). The model is simple. „Justices come to the Supreme Court with their ideological preferences fully formed and cast their votes“ (Unah and Hancock 2006: 296). The votes are then counted as pro or con upholding the statute in question with the ideological preferences of the justices being derived

from the constitutional issue debated (Bond 2007). His results supported the growing sentiment that justices underlying personal attitudes and values affect their decision making on the bench (Ostberg 2004; Segal 2001).

Pritchett, however, did not provide a coherent theory of judicial decision making (Segal 2001:80). He didn't 'model' his findings so to speak. It was Glendon Schubert who first formulated a detailed, attitudinal model of Supreme Court decision making in 1965. Schubert applied so called 'psychometric scaling techniques' (in other words, Guttman Scaling techniques) in his research that allowed him to rank order justices attitudes and correlate them with constitutional issues (Ostberg, Wetstein and Ducat 2002). His assumption was that if justices are voting primarily on their attitudes and beliefs on the constitutional issues at hand, then it should be possible to find an ordinal relationship among the justices. Segal (2001) provides an example of this. If we can demonstrate from these votes the existence of an ordinal scale, then it can be argued that justice x is more conservative than justice y, and justice y is more conservative than justice z. Also, if this relationship exists, we can infer that the justices are indeed voting according to their attitudes (p. 81). Not only did his model confirm Pritchett's findings two decades earlier but also managed to explain the overwhelming majority of the court's decisions (Segal 2001: 87).

While Schubert's model was elaborate (especially at that time) it wasn't perfect. It was a bit one-dimensional or simplistic in a sense that it did not take other factors than attitudes and values into question (Hagel and Spaeth 1991). Also, his estimation of the justices ideology was questioned for various reasons, one of them being the validity of the attitudinal variable. Inferring justices attitudes and values (the independent variable) from the votes (the dependent variable) poses a circulatory problem. It is indeed possible to bypass this problem somewhat by using justices votes considerably far back in time. Although, this does solve the circulatory problem (since it's not just current votes that are used) and adds useful tests for the stability and predictability of justices votes, it still lacks an independent explanation for justices votes in the past. Past votes may predict how justice x votes today but it still lacks independent evidence about what caused justices votes in the past that, in turn, makes the basis for justice x vote today unclear (*Ibid.* p. 89). After all, we are interested in the *causes* or the causality behind the phenomenon in question.

This dilemma isn't easily resolved. For one thing, there is no survey data available on justices social or political views and attitudes. And it is also highly unlikely that such data will exist in the future. Therefore, the challenge of creating good proxy variables for these attitudes remains (Koopmans 2005).

Since Schubert, many scholars have worked on improving the validity of the model. Among those are Sidney Ulmer (1972), C. Neal Tate (1991) Jeffrey Segal and Harold Spaeth (1993, 2002), Lee Epstein (1998, 2001, 2002), Martin Shapiro (1994, 2002), Alec Stone Sweet (2000, 2003) and many others. While these scholars have all carried on with Schubert's quantitative analysis of judicial-

decision making in constitutional cases they have added important dimensions to the attitudinal model (even to the degree that some scholars consider the new insight as nearly separate submodels to the attitudinal one). It was Sidney Ulmer who first took the attitudinal model to higher levels, so to speak. He argued for the multi-dimensionality of the judicial decision-making *construct* by enlarging the concept to include other aspects of the process such as the grants and dismissals of certioraries (as opposed to Schubert who limited his work to justices' *votes* on civil rights and liberties cases). As Ulmer pointed out, decision-making in regard to certiorari extends well beyond just simply granting or denying writs. In deciding the cases to be heard, Ulmer argued that the court is essentially following three separate but intertwined agendas: the jurisdictional agenda, composed of litigants' application for a review fall into the court's jurisdiction (i.e. sorting out what cases the court *decides* it has a jurisdiction to hear); the plenary agenda, consisting of cases that the court has agreed to hear; and the issue agenda, and the issue action agenda, including the issues in the accepted cases. Not only does this technique account for justices' votes on constitutional issues but it also taps into the decision-making process *before* the actual voting takes place. Ulmer's findings did, indeed, show a significant relationship between litigant status and whether the justices voted to hear or not to hear a case on the one hand and between dissenting votes on the denial of certiorari and political divisions (cliques) on the court, on the other (Bradley 2003).

In addition to this, Ulmer's focus on the multi-dimensionality of the judicial decision-making process brought into light the effect of conflict on the court. He was actually the first public law scholar to quantify conflict on the court as a separate explanatory variable. In one study, for example, Ulmer defined a case where conflict was present as where one or more justices assented and alleged a conflict between the majority decision and a previous court ruling.² Ulmer's findings did, indeed, show that conflict so defined was significantly associated with the Court's review decisions (Segal 2003; Bradley 2003). Since Ulmer, studies on High courts mushroomed. Various scholars drew on Ulmer's perception of the multidimensionality of judicial decision-making and extended the attitudinal model even further (Tate and Sittiwong 1989: 900).

Drawing on Schubert's and Ulmer's work many scholars (see, for example, Hagle and Spaeth, 1993 and Tate 1981) augmented the attitudinal model by using the justices' social and personal attributes as predictive variables. According to the explanations of judicial decision-making under the personal attributes model, judges are influenced by their socio-economic background including regional ties and political affiliations. Tate, for example, formed personal attributes models of the civil rights and liberties and economic decision-making

2 Previous court rulings often become precedents and thus, are good measurements of judicial activism, if justices deviate from them.

on the United States Supreme Court that accounted for 70-90% of the variance in judicial decision-making. Seven variables represented six ideas (or concepts) that accounted for this success. These concepts are *party identification* (a proxy variable), *appointing president*, *prestige of pre-law education*, *appointed for elective office*, *appointment region*, extensiveness of *judicial experience*, and types of *prosecutorial experience* (Tate 1981: 355). A few years later, Tate and Sittiwong applied the personal attributes model to Canadian Supreme Court justices and got similar results. However, they also stressed the point same personal attributes models may not apply equally accross time and accross countries. The concepts used in the US and the Canadian setting would have to be to be localized according to the time being studied or the country at hand (Tate and Sittiwong 1989: 901).

Still, the success of the personal attributes model did not go undetested. The model was (and still is) criticised for having a spurious relationship with judicial decision-making, especially when it comes to judicial activism. Critics strongly suggest that justices personal attributes may be linked to changes in societal and political environment of the courts, i.e. that justices decisions are responsive to other elements than their own political views and attributes (Roesler 2007: 548). In this vein, McWhinney argues (2006) that case salience (i.e. the political importance of a case) or conflicts (like Ulmer had pointed out earlier) are associated with their underlying statutes (especially when the statutes are unclear) and are more likely to invoke the justices personal attributes than other cases. The argument is this: on avarage, justices are inclined to fall back on their own views and preference *only* when all other fails. McWhinney points out that the civil liberties cases that public law scholars usually rely on in their research on judicial activism (or judicial behavior in general) are among the least consensual ones and, thus, are more likely to invoke the justices own perception of what is right or wrong. Like Tate and Sittiwong argue (1989) (cited above), comparative judicial scholars are suggesting that the personal attributes/attitudinal model is mostly a North-American model and is not as applicable in other countries. This is supported by the fact that judicial activism (or judicial politics) has spread (or occurred) all over the world, also to countries that are homogenous in nature. And, since homogenous countries tend to produce justices with similar backgrounds and attributes, something else must account for judicial activist breakout. Martin Shapiro noticed this as early as 1964. He stressed the importance of rounding out „political science by somehow integrating legal and judicial facets into the total picture of political life“ (In Gillman 2004: 366). Since political and/or legal rules vary accross nations and (sometimes) continents, adding such variables into a model of judicial behavior (in order to explain and/or predict judicial activism) will boost it's explanatory powers in comparative research. As Shapiro argues „it is often in the doctrinal realm, rather than in the sterile realm of mere decision-making, that the justices shape the political role of the Supreme Court. In fact, if the Court is treated as a policy-making body, then a scholarly focus on votes rather than policy, misses what is arguably the most important feature of the Court's work“ (quoted in Gillman 2004: 370).

The rise of the rational/strategic model

The literature on judicial decision-making includes a growing number of research asserting that justices have preference over policies as well as over the letter of the law. Unlike the attitudinal and the personal attribute models (at least the classic ones) these preferences are not based on the justices backgrounds or life experiences but more on their perception on what decisions will benefit them now or in the future. Hence, judges (here justices), are inclined to act strategically to maximize their benefits (Parickh and Darnell 2007: 5). The main difference between the attitudinal/attributes models and the strategic one is, therefore, that the former attempts to explain decision-making by looking into the *past* while the latter one claims to be grounded in the now or the near (possible) future.

While the concept of strategy in political science derives from rational choice theory, the two are not quite the same. A rational decision-maker chooses the best action according to his preferences given the specific constraints facing them while the strategic decision-maker recognizes his interdependence with others and *negotiates* in order to attain his goals (March and Olsen 1976; Cabantous 2007).

Much of the literature covered here suggests that Supreme Court justices (or the equivalent) in any country do in fact negotiate 'decision possibilities' in their chambers. Unlike the legal model, which states that justices argue on points of *law*, the strategic model claims that justices do their negotiating from the standpoint of reaching their own personal goals. This does not mean that the strategic model rejects points of law as factors in judicial decision-making, on the contrary. It simply argues that personal goals are a factor, albeit a strong one (Spiller and Gely 2007).

It is ironic to note that the use of rational and strategic choice theories in the analysis of judicial decisions started with the very founders of the attitudinal model: C. Herman Pritchett and Glendon Schubert. According to Pritchett both politicians and judges (especially Supreme Court justices) have a lot in common. They decide important public policy issues, form opinions and vote yay or nay on the issues at hand: in favor or not. They also enjoy considerable discretion in their voting. In particular, the concepts of rationality – each legislator acts to advance his or her own particular interest – and strategic behavior – individuals recognize their interdependency of their actions in a forward looking manner – was fundamental in further developing Pritchett's notion of the strategic justice (Spiller and Gely 2007: 2).

Pritchett's follower, Glendon Schubert, experimented with *games* (game theory) in his analysis of judicial decision-making. The most recognized of his games was the „Hugbbergs game,“ a „zero-sum game where the justices in the majority split the policy payoff (set to unity), while dissenting justices receive nothing.“ (Segal 2003: 91). The Hugbbergs game was sophisticated in some aspects, it was criticised for many defects, most notably for sidestepping policy goals and focusing instead on the majority/minority spectrum. That is, the game implies that the justices attempt to be in the majority group just for the sake of

being in it, not because of the policy issue in question. In addition to this, how can the *Hughberts* game explain dissenting votes? If justices seek to be in the majority to reap the benefits, so to speak, than why do some justices dissent? (*Ibid.*, p. 92). Indeed, research on dissenting votes on judicial high courts has proliferated since Schubert mainly because of their conflicting nature. Conflicts on the bench increase variability in the opinions, both majority opinions as well as dissenting opinions, and, therefore make operationalization and quantification easier (cite).

The next major theoretical advancement came in the 70's (see, for example, Rhode and Spaeth 1976) and the 80's. B. Marks study (1988), for example, formalized the effect of constraints imposed on the courts by the separation of powers doctrine. Marks' main focus was on the potential of Congress to reverse a judicial decision by looking at a set of conditions under which Congress could not reverse (or modify) the Court's decision. By focusing on real constraints and pairing them with actual judicial decisions makes for a somewhat simple, empirical measurement. The assumption is that as long as justices' preferences are policy based, they are better off selecting policy decisions that are reversal proof, so to speak. Hence, justices maximize their advantage (or utility) bound by the constraints imposed by appropriate political players (Spiller and Gely 2007:4). From this, it is possible to assume that high courts (in such a political setting referred to in Marks's study) will refrain from delivering decisions that are likely to initiate a harsh power struggle between the court and the legislature.

In a similar vein to Marks, Spiller and Spitzer analyzed (1992) the Supreme Court's choice between making a decision on constitutional or non-constitutional accounts by using a strategic representation that included the Congress, the courts (specifically the Supreme court), the President and several relevant public agencies to explain the Court's hesitancy to declare legislation void. Their results suggested that the Court's preferences would have to be significantly different from the political officials in question to issue a constitutionally prohibitive decision to bring back some sort of a balance or equilibrium (p.38).

Parikh and Darnell offer an alternative to the individual driven strategy models (2007). By studying interbranch bargaining in India they discovered that High courts justices do act strategically according to their preferences, albeit not to maximize their personal utility (or power) but, rather, to maximize the courts' power. As Parikh and Darnell state it „judges care about policies and issues of law, but they also have preferences over the strength and the stability of the court.“ (p.7). This is a very reasonable statement. After all, as Parikh and Darnell argue, in order to establish their policy preferences or increasing their personal powers, the court must be relatively stable and have political clout to enforce their decisions (*Ibid.*).

Parikh's and Darnell's conclusion is in line with institutional theories or New Institutionalism. Indeed, strategic theories are closely related to institutional theories in politics which is the subject of the next section.

Neo institutionalism and judicial activism

In 1988, around the time Marks was publishing his influential paper on the strategic Supreme court (see above), Rogers Smith called for a new institutionalist turn in judicial (or public law) scholarship (in Bloom 2001: 220). By this, Smith meant that political academics „should spend more energy understanding how ‘institutional’ factors - such as the limitations of judicial office and the constraints of precedent – might inhibit judicial policymaking (*ibid.*). Smith’s call wasn’t a call for a ‘new’ perspective, so to speak, in public law scholarship but more a call for the renewal of institutional factors as independent, explanatory variables. Once again, traces of the institutional perspective are to be found in the work of some behavioral/attitudinal theorists as well as in older political science studies. Rohde and Spaeth’s study, *Supreme Court Decision Making* (1976), is a great example. Responding to new trends in public law and economics, Rhode and Speath added an interesting twist to their work on judicial decision-making. By adding ‘rational’ and ‘institutional’ variables to the traditional attitudinal model, such as individual goal seeking, rules and situations, they were able to provide a clearer explanation for why the justices were able to engage in attitudinal behavior. Drawing upon political economics (that was becoming popular at that time) Rohde and Speath speculated that Supreme Court justices were goal oriented like other political actors. Indeed, they pointed out that given various decision choices in court, justices tend to go with the option that mirror their goals the most. They did point out, however, that these choices can be limited by formal and informal rules as is the case in other political institutions.

Indeed, Rhode and Spaeth’s institutional emphasis was later supported by Lee Epstein and Jack Knight. Epstein and Knight start with the important observation that justices on the Supreme Court change their minds or join opinions that do not reflect their personal policy preferences in more than half of all cases that they hear. Like Rhode and Spaeth before them, Epstein and Knight proposed an alternative to the attitudinal model that relied on strategic measurements on the one hand and institutional constraints on the other. They measured strategic behavior by analyzing, for example, anecdotal evidence from the Court’s memoranda, examining the number of times justices made explicit bargaining statements in memos to other justices. These data were supplemented with aggregated data from the Supreme Court³ as well as measures on standard court procedures, routine policies and other built-in institutional factors (Bloom 2001) with good, predictive results.

Numerous other studies signal the importance of institutional factors in the analysis of judicial decision-making, especially judicial activism. One such theory, let’s call it „relative legislative powers“ has gained foothold in the past two

3 More specifically, Epstein and Knight relied on data collected from the Burger Court years, 1969-1986.

decades. According to this theory High Courts powers are limited in such systems (or in such times) when it is easier for the legislature to override the court and when a strong, unified political party controls the government or the governing coalition, as is the case in many European multiple party systems. The stronger the legislative powers, the weaker the constitutional courts become (Spiller and Gely 2007: 8). Following this example, Epstein et. al (2001) apply this framework to the Russian Constitutional Court's decisions in 1992-1993. The conclusions were that the Court's decisions during this period were strategically problematic in entering into conflict with the President. Following this period, and the political reformation on the Court in the Yeltsin years, the Court's decisions were in tune with the forecast of strategic behavior and mirrored its adjustment to the new political landscape (in Spiller and Gely 2007: 8-9).

Other powerful, but competing, theories involve the 'supply' and 'demand' concepts to explain and/or predict judicial activism. In short, the supply concept is used to describe a court that favors activism and feels that it should intervene in politics while the demand concept refers to the forces within civil society that literally call for more judicial intervention. The question, these studies ask is simply this: when, and under what conditions, is judicial activism likely to flourish? Charles Epp explores this question by looking for evidence in the support structures advocating civil rights (i.e. that formulate the *demand* for judicial intervention). Epp hypothesizes that as activists gain material resources and organize into coherent groups, an observable change will take place at the judicial level in favor of individual rights. Epp finds evidence for his hypothesis by investigating these processes in a few countries (Britain, India and the US, for example) where he compares the strength of the support system with the relative strength or activism of the local High Courts (Roesler 2007: 548-549). Epp's demand notion can also be rephrased as a 'bottom-up' perception of judicial activism. That is, the forces behind increasing judicial activism is brought about by changes in civil society that 'demand' reaction from the courts.

Ginsburg (2003), on the other hand, rejects Epp's demand hypothesis, i.e. that judicial activism is determined by the strength of the support structure in a polity, and focuses instead on the power relations between the High courts and other political bodies. Judicial activism, he argues, happens from the top down; within the political power structure, and trickles down from there. In his book, *Constraining Political Power: Courts and Governmental Actors in East Asia*, Ginsburg investigates the extent to which court decisions actually constrain other political actors (especially political parties) within each country's executive and legislative bodies. He hypothesizes that the more power a High court has, relative to other agents of government, the more active will it become in constraining legislative and executive powers. Unlike Epp, Ginsburg looks at the relationship between High courts and society from a *supply* perspective where courts are more likely to intervene in legislative actions (and succeed) when they have a large enough supply of constitutional powers (Roesler 2007: 553).

Constitutional design, therefore, forms the starting point for Ginsburg thesis. In those instances where the constitution delegates powers (e.g. judicial review powers) to the High courts by written or unwritten constitutional rules, Courts are almost guaranteed to exercise it regardless of the support structure (*Ibid.* p.554). While Ginsburg's thesis has a point (e.g. it's reasonable to expect a High court with constitutional review powers to exercise it) it does not explain the varying degree of judicial activism in different countries. Why do High courts in two different countries, that have both institutionalized constitutional review, exhibit different tendencies for exercising it? Some scholars (such as Epstein and Knight 1998) would argue that the degree of judicial activism is dependent on institutional constraints that are not always obvious to the eye, such as routines within the court itself and the preferences of the Chief Justice. Along these lines, Epstein and Knight offer an account of judicial behavior in which justices act strategically and in response to the preferences of other justices and institutional constraints. For example, institutional norms governing the assignment of opinions provide yet another important opportunity for strategic behavior. In the United States, the lead opinion writer sets the stage for subsequent bargaining and can, therefore, significantly affect the policy outcome in the case. This, and numerous other examples, suggest that institutional norms are important explanatory variables in judicial activism (Bloom 2001).

In the general sense, strategic and new institutional variable measurements are „newer“ to the stage than the attitudinal ones. In the US, for example, the databases covering attitudinal and/or background variables of Supreme Court Justices past and present, are very large and sophisticated. Public law scholars have been working on these data since Pritchett's *Roosevelt's Court* (1948). The data are clean, processed and easy to work with. No wonder it's popularity. Strategic and institutional variable measurements are not as established. And certainly not as clear-cut as their attitudinal counterpart. Conceptualizing institutional variables is no easy task. Let alone the „strategic“ ones! The next section will discuss the various conceptualization of institutional and strategic variables in judicial behavior.

Conclusion and Discussion: From concepts to variables

As the literature reflects there is no „right“ method to study judicial activism. As with other social phenomenon, the longer we study it, the more complexed it becomes. Social and/or political behavior does not happen in a vacuum. It has many layers and many sides. This is especially true for judicial behavior. In the principle, judges are not political beings. Still, their judicial review powers inevitably put them right into the middle of politics. When the constitutionality of a legal statute lands on the High Courts agenda, it invokes the political role of the court. Public law scholars throughout the world have dealt with this dual role in their empirical models of judicial decision making in various ways. The

attitudinal/personal attributes model conceptualizes judicial decision-making at the individual (micro) level. It's main premise is that justices bring to the bench their life experiences and personal values and make their legal decisions accordingly. The strategy model emphasizes personal goals and individual bargaining powers while the institutional paradigm stresses legal rules and institutional processes. Many scholars are now advocating the use of combining methods in the studies of judicial activism (see, for example, Koopmans 2005 og Zorn 1998). The argument for this is that judicial decision-making in constitutional cases crosses the boundaries between legislative and judicial boundaries. In that case, explanatory models should include variables that represent both worlds. The legal world and the political world. The legal variables can take the form of institutional rules and processes along with unwritten traditions that the Courts under study have developed over time. The political variables, on the other hand, are tougher to define and operationalize into unbiased measurements. The attitudinalists attempted to do exactly that by using proxy variables as indicators of justices political preferences. As critics argue, though, this may only apply to justices on the United States Supreme Court, not courts in other countries where judges come from more homogenous backgrounds (Harty 2005).

One of the main assumption of quantitative analysis is that the independent (or explanatory) variables should not be highly correlated. If they are not independent from each other, the relationship they have with the dependent variable might be spurious. As Ishyama-Smithey and Ishyama point out (2002) it is possible that attitudinal and strategic variables correlate in such a way that they produce a false relationship with judicial activism. It could very well be that the Court itself *as an institution* (at the group level) fosters specific values and ideas that the majority of justices grow accustomed to over time and, later, adopt. It is also possible that strategic behavior (that justices choose the *relative* option) can encourage justices to make decisions that appear liberal or conservative regardless of their own personal views (see also, Martin Shapiro 1994). Also, and this is the most challenging question, how can we distinguish between strategic behavior that is aimed toward maximizing the individual lot or strategic behavior which purpose is to benefit the Court as an institution? Or the rule of law? Of course this all boils down to the same root. Strategy and ideology are strategy and ideology, whether it is in the Courts interest or in the individual justice interest. On the other hand, if the purpose of research is to explain behavior and, from that, predict behavior in the future, an understanding of the underlying factors is extremely important. If we want to understand what forces *drive institutional* change (Harty 2005), the explanatory variables must be grounded in the Court's setting.

The explanatory variables are only half of the problem (if that!). Definitions of the dependent variables (judicial activism) has stirred up many debates in the academia as well as in civil society. As I stated in the introduction, some quantitative literature has recently begun to define activism as the number of

times a court with constitutional review powers strikes down legislation. This method has been criticized by many (see, for example, Kmiec 2004). The main argument is this: striking down legislation is appropriate behavior for a constitutional court if the legislation goes *against* the constitutional rule. Since judicial activism is commonly perceived as an *inappropriate* judicial behavior (see the *introduction* to this paper), the „striking down law“ measure, the critics claim, is invalid. Instead, scholars should attempt to define the concept in such away that it excludes (or controls for) „strike-downs“ where the constitutional violation is clear and the Court *should* act (xxx 2005).

From the outset, this appears reasonable. After all, many High Courts have clear constitutional review powers written in statutes. Looking more closely, however, reveals the possible inaccuracy of the „should factor“ in quantitative analysis of court's decisions. Whether the courts should or should not act, is a normative concept that, in essence, has several meanings. Constitutional rules are usually ambiguous and give way to many interpretations. The more the ambiguity, the more conflict it generates (Bloom 2001; Koopmans 2005). Since Ulmer (discussed earlier in the paper) many scholars in the United States have focused on conflict or case salience in Supreme Court's decision-making. Their result is generally that conflictual cases and/or politically important cases (salient cases) are more likely than non-conflictual cases to correlate with the justices' political views in addition to provide a fertile ground for strategic decision making (see, for example, Ulmer 1972 and Epstein and Segal 1992). While this seems plausible, operationalizing the conflict indicator is a different matter. In many countries, (other than the US) justices' opinions (sometimes referred to as votes) *before* the final vote, yes or no, is not public. It may not even be documented at all. In these instances the only indicator of conflict is in the non-unanimous decisions, that are not always informative. They are (usually) carefully drafted and sway away from political meanings.⁴ Also, some scholars even advise against the use of decisions as indicators of political ideology. The reason, they argue, is that legal theory resembles political ideologies in many ways. There is the conservative camp (legal formalists) the liberal camp (legal realists) and the normative camp (how laws *ought* to be). The conservatives usually advocate a 'hands off' policy in regard to legislative laws, while the liberal camp argues that politics should be kept in check by constitutional rules and principles. In theory, normativism can be both conservative and liberal but the general trend is more in line with liberalism, although it is rarely realist (See, for example, Anderson 2005 and Sowell 1989). From this perspective, it can be argued that activist justices are simply legal

4 While non-unanimous decisions may at times provide some information (other than information on legal arguments), on Justices' political affiliations, they do not necessarily distinguish the individual political views from the individual views on legal principles. Legal theory can either be conservative or liberal and may appear resemble political views.

liberals and that restrained justices are legal formalists. Although there is an obvious connection between legal theory (philosophy) and political theory, scholars should be careful in replacing one with the other (Sowell 1989). In short, when there is no individual level data on justices political ideologies and limited data on strategic settings within the Courts chambers, scholars should be careful in using these variables to explain judicial activism (see, for example, Koopmans 2005). This is not the case with established, written institutional level variables and political variables (excluding the ideological ones). Based on the literature reviewed, these include variables such as constitutional design, judicial autonomy (independence), the presence of a Bill of Rights and judicial rules of conduct, to name a few.

Debates over the definition and operationalization of the dependent variable (judicial activism) often stem from the same source as above, i.e. divisions between legal realism, moralism and liberalism. In this sense, legal realists focus on how law is in practice and how courts and judges actually behave without adherence to formalism or moralism (i.e. the law is what it is in the now). The formalists do neither. Their focus is more on the letter of the law and the original meaning, or the core essence, of the Constitution. Moralists on the other hand study how laws *ought to be* and may even advocate activism in order to achieve that (Bloom 2001; Sowell 1989).

Even though these considerations are all valid they do not hold well in quantitative analysis, let alone in comparative research where measurements need to be standardized. This does not mean that quantitative analysis should be dismissed. In fact, the opposite could be true. Let me explain. The normative and the formal approaches only apply within a country, not between countries do to variance in interpretation. Despite this, High Court decision-making in constitutional cases is becoming more and more similar and widespread across nations. This suggests that variables other than non-country factors are at play (Ringhand 2007).

In this paper, I argue that the dependent variable in quantitative analysis of judicial activism should be kept as simple as possible. As is stated in the introduction of this paper, Ishyama-Smithey and Ishyama's study of judicial activism in post-communist countries provides an interesting viewpoint (2002). Their classification of the dependent variable (activism) is simply the count (frequency) of judicial decisions that strike out or reject legislative statutes. Despite the normative and the realist criticism, that legislative strike-outs are not always 'activist' but appropriate judicial behavior, this measurement does provide for an excellent variable that can be measured comparatively. After all, we do not know when High Courts should declare laws unconstitutional and when it should not. It is a matter of interpretation, not facts. Therefore, it can be argued that variations in frequency of judicial activism (strike-outs) are indicators of the High courts *willingness* to engage in 'activist' behavior regardless of any norms and or ethics. Ishyama-Smithey and Ishyama's model included variables on institutional

structures as well as institutional politics. Surprisingly enough, their result was that the presence of a bill of rights in these countries was not statistically related to judicial activism. Furthermore, activism had only a moderately strong curvilinear relationship with judicial power (independence). The relationship was significantly linear up to a certain degree, then it leveled off and took a dip downward. The best predictor variables in their model were the level of party competition (i.e. the number of political parties) and the level of public trust toward the court system generally along with a separate variable of the *relative* public trust in courts compared to parliaments (pp. 734-736). It is interesting to note that these results are in line with both the 'supply' and 'demand' theories discussed earlier. The 'supply' paradigm stresses the influence of High Courts powers relative to the parliament. When parliaments or political party coalitions are weaker, courts are likely to become more active. The 'demand' concept, on the other hand, seeks to explain judicial activism from the 'bottom-up.' In countries where interest groups and lobbyists are mobilized and have the financial funds available, courts are more likely to be activist.

From this I conclude that individual level variables on judicial activism (such as attitudinal and political ideological) should be cut back a bit in comparative analysis between countries. There are two reasons for this: First, unlike their United States counterpart, constitutional justices are a homogenous group in many countries which makes for a limited variance. And limited variance offers limited results. Secondly, most European High courts differ from the United States Supreme Court in a way that they do not publish the preliminary votes preceding the final decision. Without extensive information on the individual judicial behavior throughout the decision making process, it is hard to establish a plausible theory of the individual impact on judicial decisions. After all, judicial activism is a group behavior. Justices make decisions in *groups*, not singularly which suggests that it may not be appropriate to analyze the decisions at the individual level, at least for the time being. As the literature suggests, in comparative analyses it is more feasible to use variables that are more general and more concrete than are variables on attitudes and beliefs. Following the example of Ringhand (2007) and Ishiyama-Smithey and Ishiyama (2002) there are other explanatory variables, more common to constitutional courts, that are more feasible than the attitudinal ones. Ishiyama-Smithey and Ishiyama, for example, found significant relationships between a court's activity and legal/institutional factors such as the presence of a bill of rights and the extent of judicial independence. In a similar vein, Anne Blom (2001) stresses the importance of influential international court decisions on national, constitutional courts, that have had tremendous impact in Europe and even in the United States. A clever construction (or mapping) of the political, institutional and legal aspects of the constitutional courts under study is in order. Quoting Ringhand (2007), such systemization will hopefully „contribute to will contribute to the growing effort to steer constitutional scholarship away from abstract theories of judicial review

and toward a more grounded understanding of the role judicial review and constitutional interpretation play” in various legal systems (p. 45).

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